full significance of the Schechter's perjurious limitation of the 1954 contribution to $150.00 will be set forth below under Argument.

On July 2, 1959, defendants' motion for a new trial was denied (D98a) by Mitchell H. Cohen, J. C. C., who had been temporarily assigned to Middlesex County, and who had not presided at the trial of the defendants. Judge Cohen did not order depositions taken of the witnesses who were offered by defendants, but decided the motion on the *ex parte* affidavits alone.

On September 28, 1959, a Notice of Appeal from the denial of defendants' motion for a new trial was filed (D99a). On May 5, 1960, the Superior Court, Appellate Division, affirmed the denial of defendants' motion for a new trial in a *per curiam* decision (Supp. D2a to D3a).

On July 7, 1960, defendants filed a Notice of Appeal to the Supreme Court of the State of New Jersey (Supp. D10a). On November 21, 1960, the Supreme Court of the State of New Jersey, in a *per curiam* decision, affirmed the judgment of the Appellate Division (*infra*, A-1 and A-2).

b. Background Facts.

A full understanding of this case requires a brief recitation of the sequence of events relating to the arrest and conviction of the defendants.

Defendant, David Schneider, was Borough Attorney of South Plainfield. In the course of his duties he was directed by the Mayor and Council to draft a new ordinance pertaining to junk yards (D219a-26 to D220a-22). On March 25, 1954, the new ordinance was adopted (D220a-7 to 9).

Pursuant to the new ordinance, junk yard owners Charles and Morris Schechter were required to remove cars from certain lots (D221a-6 and 7). Another ordinance required the Schechters to erect a fence about their prem-

ises (D221a-8 and 9). During the year 1954, numerous complaints had been received against the Schechters for the violation of the zoning ordinances (D222a-28 and 29; D223a-8 to 19).

On September 12, 1954, a junk yard license was issued to the Schechter brothers with a warning to comply with the various ordinances (D100a-30 to D101a-9).

On March 10, 1955, two complaints were issued against Morris Schechter for violation of the zoning ordinance and the junk yard ordinance (D226a-7 to D227a-13). While this case was pending, the Schechters entered into an agreement for the sale of their business to Al Perna and Lester Chiappi (D142a-28 and 29). The contract was conditioned upon the purchasers receiving a license to operate a junk yard. On April 15, 1955, Perna and Chiappi made an application for a junk yard license. On April 19, 1955, at the suggestion of Charles Schechter, but with no indication as to the purpose, Lester Chiappi accompanied Charles Schechter to the office of David Schneider (D177a-37 to D179a-10), where Charles Schechter stated that he and Chiappi wished to make a $2,000 contribution to the Democratic party. An argument immediately ensued between Schechter and Chiappi and they left, informing Mr. Schneider that they would see him later (D231a-15 to 25). On the following day, April 20, 1955, Charles Schechter again came to David Schneider's office, this time with Morris Schechter. The Schechters informed Mr. Schneider of the pending sale (D231a-27 to 35), and they stated that they wanted to make a $2,000 contribution to the Democratic party (D232a-18 to 22). Mr. Schneider replied that such a contribution would have no effect upon their case (D232a-23 to 27) and that the trial of their case, scheduled for that very day, would not be adjourned (D232a-30 to 33). The case did in fact go on that same day, and the

Schechters pleaded guilty to both charges (D104a-8 to 10; D348a-40 to D349a-30).

The Schechters, having delivered the $2,000 contribution to David Schneider at 2 P. M. on April 20, 1955, went directly to their attorney, Mr. McDonough, where they met Assistant Prosecutor John Molineux (D111a-12 to 34). At approximately 4 P. M. of the same day, Mr. Schneider received a telephone call from Mr. Silverstein, the attorney for Perna and Chiappi in the proposed purchase of the Schechter business. Mr. Silverstein informed Mr. Schneider that "something phony was going on" and that something was about to be reported to the Prosecutor's office (D233a-17 to 29).

On the evening of April 20, 1955, the Police Committee approved the issuance of a junk yard license to the Schechters for a limited period of time, until June 1, 1955 (D381a-39 to D383a-22).

On April 21, 1955, David Schneider called Morris Schechter concerning the Silverstein telephone call, and on April 23, 1955, Mr. Schneider spoke to the Schechters' attorney, Mr. McDonough, about the same telephone call. Both Schechter and McDonough replied that someone was "pulling his leg" (D234a-7 to D235a-12).

At 9 A. M. on April 25, 1955, David Schneider returned the $2,000 contribution to Morris and Charles Schechter stating, "Take your contribution back. This was intended to be a contribution to the Democratic party, with no ties attached. I made no promise to you, and I am returning the money" (D235a-35 to 40). Nevertheless, the applicants continued in their quest for the license, and on the *evening* of the very same day on which the money was returned, to wit, April 25, 1955, the executive committee directed the Borough Clerk to draw a resolution, to be presented for formalization three days later, granting the Schechters a

temporary license until June 1, 1955 (D340a-11 to 22). *It will thus be seen that on the evening of April 25, 1955, the licensing of the Schechters, but for formalization, was an accomplished fact. The allegedly extorted sum of $2,000 had been returned to the Schechters that very same morning.* A full license was to be granted if and when the yard was cleaned up and a proper fence erected (D339a-21 to 32).

On April 28, 1955, David Schneider, acting in his capacity as Borough Attorney, telephoned Morris Schechter and suggested that he present a sample of the fence he intended to use for the junk yard (which together with the cleaning of the yard would entitle the applicants to a *permanent* license) at the Council meeting at 7 P. M. that evening (D239a-34 to 39). At 6 P. M. that evening, Charles and Morris Schechter appeared instead at the home of David Schneider (D240a-15 and 16). Mr. Schneider accompanied the Schechters to the home of Councilman John T. Soja who was shown the fence sample (D241a-18 to 20). At this time, Morris Schechter again expressed his desire to make a $2,000 contribution to the Democratic party (D241a-21 and 22). Mr. Soja accepted the money after making it clear that the Schechters would not receive greater consideration than other junk dealers (D282a-6 and 7). Mr. Soja handed the $2,000 over to Mr. Schneider as campaign manager (D241a-31 to 36).

On April 29, 1955, David Schneider and John T. Soja were arrested, and thereafter were indicted by the Middlesex County Grand Jury (No. 157-55) for extortion under the promise that they would use the power of their respective offices to exhort and influence the Mayor and Council of said Borough of South Plainfield to vote in favor of the issuance of a junk yard license in violation of N. J. S. 2A:85-5 and N. J. S. 2A:105-1 (D1a to D2a).

ARGUMENT—REASONS FOR GRANTING THE WRIT.

Defendants-petitioners were prejudiced by the denial of a fair trial in violation of the due process clause of the 5th and 14th Amendments of the United States Constitution since perjured testimony was knowingly used by the State and testimony favorable to the defendants was knowingly suppressed to obtain their conviction.

Although the denial of due process was argued before the Superior Court of New Jersey, Appellate Division, the Court's short *per curiam* opinion made no mention, whatsoever, of this vital issue (Supp. D2a).

The *per curiam* opinion of the Supreme Court of New Jersey leaves the defendants-petitioners, particularly the defendant attorney, in utter frustration as to the basis of its determination. By simply concluding, without explanation, that the "constitutional issue is without substance", the Court has rendered "due process" devoid of any meaning whatsoever to these defendants.

a. Analysis of New Jersey Supreme Court Opinion and Argument on Facts.

In its opinion, the Supreme Court of New Jersey states:

> "Our examination of the record satisfies us that the alleged constitutional issue is without substance" (*infra*, A-2).

By this conclusion, does the New Jersey Supreme Court mean to indicate that as a matter of law the knowing use of perjured testimony and the knowing suppression of material evidence by the prosecutor does not constitute a

denial of due process? If so, the decisions of this Honorable Court are to the contrary. See *Mooney* v. *Holohan*, 294 U. S. 103, 79 L. Ed. 791 (1935); *Pyle* v. *Kansas*, 317 U. S. 213, 87 L. Ed. 214 (1942); *White* v. *Ragen*, 324 U. S. 760, 89 L. Ed. 1348 (1945); *Alcorta* v. *Texas*, 355 U. S. 28, 2 L. Ed. 2d 9 (1957); *Napue* v. *Illinois*, 360 U. S. 264, 3 L. Ed. 2d 1217 (1959). See Part "b" of Argument below for full exposition on the law.

On the other hand, by the conclusion aforementioned, does the New Jersey Supreme Court mean to indicate that as a matter of fact there has not been perjured testimony and a suppression of material evidence? If so, the record is inexorably to the contrary.

The record shows that Morris Schechter, one of the State's key witnesses, testified before the Grand Jury on May 3, 1955 (D39a-29 to 31). He testified, under oath, concerning events in 1954, as follows:

> "Q. You were informed by your brother and Calderoni that they had to pay $2,000 in order to avoid being bothered by the borough officials? A. That is right".

Charles Schechter, the other State's key witness, testified before the Grand Jury on the same day (D40a-23 to 27). He testified, under oath, as follows:

> "Q. And did you or either Calderone give anybody any money? A. Yes, we did.
> Q. In 1954? A. That is right.
> Q. Who did you give any money to, and what for?
> A. We gave the money to Mr. Schneider * * *".

Charles Schechter further testified as follows (D41a-7 to 11):

> "Q. Well, without going into too much detail, did you finally give Soja or Schneider $2,000? A.

Yes. The next day I called up my partner, Pete Calderone, went to his house as we were supposed to, and we gave him $2,000 * * *."

A Grand Juror asked Charles Schechter the following question (D41a-14 to 17):

"A Juror: Charles, I would like to ask you this. I believe you stated that back in 1954 you paid $2,000. Was I correct in that?

The Witness: That is right."

The Foreman of the Grand Jury put the following question to Charles Schechter (D41a-34 to 36):

"The Foreman: But you paid $2,000 while your brother was in the service, and then this recent $2,000?

The Witness: Yes."

No indictment was handed down relating to the contribution of $2,000 made in the year 1954.

Charles Schechter, during the trial on March 15, 1956, did not testify as he had before the Grand Jury; to the contrary, he testified that on September 24, 1954 he gave a contribution of only $100.00 (D383a-23 to 31) and another contribution to the Democratic campaign in 1954 of $50.00 (D384a-5 and 6).

At this juncture, it must be emphasized that it was the State which initiated the interrogation on the matter of the 1954 campaign contribution, and that as aforementioned, there was no return of an indictment relating to the 1954 contribution. And so, on the cross examination of David Schneider by Mr. Molineux, assistant prosecutor, Mr. Molineux interrogated Mr. Schneider as to whether the Schechters made a contribution in 1954. Mr. Schneider testified that sometime in March, 1954, before the primary,

the Schechters made a campaign contribution of one thousand dollars (D263a-34 to 36; D264a-21 and 22). Mr. Schneider further testified, on cross examination, that for the general election of 1954, a further contribution of $50.00 and another one by check for $100.00 were made by the Schechters (D264a-37 to D265a-15). On this same issue, Mr. Soja, on cross examination, testified that the Schechters made a campaign contribution in 1954 and stated: "I believe it was a thousand dollars, sir" (D329a-5 and 6). He further testified, "I don't know exactly, but I believe it was a thousand dollars (D329a-8 and 9). David Schneider, in his affidavit dated October 7, 1958 states that, "In discussing the March 1954 contribution with John Soja, the co-defendant, I was of the impression that the amount contributed in March of 1954, and of which we had no written records at the time of trial, was $2,000. Mr. Soja was of the impression that the amount was $1,000. In view of the fact that I was distraught, under terrific mental strain and worry, I felt perhaps that Mr. Soja's recollection was more accurate than mine in this respect and I testified that $1,000 was the sum contributed by the Schechters in March 1954 • • • I am positive that in March 1954 the contribution made by the Schechters was $2,000" (D6a-40 to D7a-17).

The State, realizing the importance of the testimony of a $1,000 contribution in 1954 which was already before the trial jury, recalled Charles Schechter, on rebuttal, for the ostensible purpose of contradicting the testimony of Mr. Schneider and Mr. Soja. On rebuttal, Charles Schechter was asked by Mr. Molineux (D384a-12 and 13):

> "Q. Did you make any other campaign contribution to the Democratic party in 1954? A. No, I didn't."

A further question was put to Mr. Schechter by assistant prosecutor Molineaux (D384a-18 to 22):

"Q. It has been testified to that a campaign contribution of one thousand dollars was given by the Schechter brothers in 1954 to the Democratic campaign. Was there any such contribution? A. That is not true. We never gave such a contribution."

The Court, grasping the significance of a substantial contribution in 1954, and obviously wishing to avoid an answer which was unclear for semantical reasons pursued the point (D384a-28 to 32):

"Q. You say you gave no campaign contribution of one thousand dollars in 1954. Did you give one thousand dollars in 1954? A. We didn't give any one thousand dollars in 1954, or any other year."

It requires little show of reason to realize the materiality of the fact that $2,000 was the amount contributed in 1954 compared with the comparatively meager sum of $150.00 claimed by Charles Schechter as having been the amounts contributed in 1954. It is noteworthy that the Schechters, contrary to their Grand Jury testimony, denied giving more than $150.00 in 1954.

It was the trial defense of the defendants-petitioners that they were the victims of a conspiracy on the part of Morris and Charles Schechter to frame the defendants by false and baseless accusations of extortion, in retaliation for defendants pressing of the compliance with local ordinances. Charles Schechter realized that if he testified at the trial, as he had before the grand jury, that $2,000 was the amount contributed in 1954, this would create the impression of a pattern of voluntary giving by the Schechters. By the perjurious limitation of the 1954 contribution to $150.00, Charles Schechter sought to create the impression that this relatively meager sum was the yard-

stick for voluntary giving. By comparison, the 1955 $2,000 payment appeared to be an amount given under pressure.

The significance of the sum of $2,000 paid in 1954 is apparent, since it coincides with the exact same amount paid in 1955. By reason of the perjured testimony, the trial jury was not afforded an opportunity to determine whether a pattern of regularity of amount of contribution was established in 1954 when $2,000 was first given. The jury had the right to ascertain whether a precedent of giving was initiated in 1954. If the trial jury would have so reasoned, and in all probability this would have been their rationale, their verdict would have been different.

This conclusion, we respectfully submit, is based on logic and reason; for if the trial jury had before it the knowledge of the $2,000 amount contributed in 1954, as testified to by the Schechters before the Grand Jury, they would have had to conclude either (1) that if the $2,000 amount contributed in 1954 was voluntarily established, then too, the payment in 1955 of the precisely similar amount of $2,000 was also a voluntary payment; or (2) that the defendants had extorted $4,000 and not $2,000 as claimed at the trial, because if in 1954 the amount of $2,000 was involuntarily paid, and in 1955 the amount of $2,000 was involuntarily paid, the sum on which the charge of extortion should have been predicated was the sum of $4,000. This latter conclusion is hardly probable in light of the fact that at the trial the Schechters claimed $2,000 and not $4,000 was the amount extorted from them. Moreover, the Grand Jury did not return an indictment for the 1954 contribution, notwithstanding testimony relating thereto, which was submitted to them. The 1954 contribution of $2,000 given by the Schechters makes more compelling the conclusion that in 1955 the Schechters were merely continuing their pattern of voluntary contribution.

Substantial contributions are the products of deliberation. The testimony of the Schechters before the Grand Jury was known to the Prosecutor at the time of trial, and yet the perjured testimony spoken at the trial was allowed to go uncorrected. To have revealed the suppressed testimony would have seriously damaged the State's case. This the Prosecutor did not do. Instead, he chose to leave the jury with the impression that $150, rather than $2,000, was the touchstone of voluntary giving by the Schechters. Having created this impression, the striking contrast between $150 in 1954 and $2,000 in 1955 constrained the trial jury to conclude that the $2,000 paid in 1955 was actually extorted. The Prosecutor's failure to correct the perjured testimony, and his suppression of the conflicting testimony before the Grand Jury, denied defendants a fair trial in violation of due process.

The New Jersey Supreme Court, treating the only issue before it, both orally and on brief, namely, the due process question, disposed of the same by stating that this issue was "without substance". The learned Court opined further (*infra*, A-2):

> "Nonetheless, we have studied the *basic merits of the appeal* and have reached the conclusion that the actions taken by the Appellate Division were correct." (Emphasis ours.)

Query, what did the New Jersey Supreme Court mean by "basic merits of the appeal"? Having disposed of the constitutional issue, it must have meant that it was disposing of some other aspect of the case as well. The only other issue raised before the County Court and the Superior Court, Appellate Division, was the newly discovered evidence which served as the basis for the application for a new trial. While it is not clear what "basic merits" the

New Jersey Supreme Court delved into, it cannot be denied that it could have, of its own volition, considered the weight to be given the supporting affidavits which were before the County Court on the motion for a new trial. *Frank* v. *Frank*, 7 N. J. 225 (1951); *Klotz* v. *Lee*, 21 N. J. 148 (1956). However, if the Supreme Court desired to so invoke its power, it was obliged to avail itself of a full review of the subject matter pertaining to the new evidence, by remanding the case for the taking of depositions consistent with *Pyle* v. *Kansas, supra.* See also, *People* v. *Shilitano*, 218 N. Y. 161 (1916), where the New York State high court ordered a similar remand for the taking of depositions. So too, the procedure of the New Jersey courts should be noted. See *First National Bank of Freehold* v. *Viviani*, 60 N. J. Super. 221 (App. Div. 1960) where the Superior Court, Appellate Division, of its own motion (in order to protect simple property rights) remanded the cause for the taking of depositions, stating (at p. 225):

> "Only by such procedure can a court make certain that it has fully explored the issue and correctly adjudged it. 'Cross examination is the most effective device known to our trial procedure for seeking the truth'."

Moreover, counsel for the defendants were never called upon by the State Supreme Court to argue the non-constitutional issue of the denial of a new trial.

If, on the other hand, it is contended that by "basic merits of the appeal" is meant the constitutional question, then apparently the New Jersey Supreme Court approves the action of the Appellate Division in failing to so much as mention the due process question in its *per curiam* opinion.

b. Argument on the Law.

From the seminal case of *Mooney* v. *Holohan, supra,* to the present, this Honorable Court has, through a line of unequivocal decisions, protected the rights of an accused against the actions of overzealous prosecutors. See *Pyle* v. *Kansas, supra; White* v. *Ragen, supra; Alcorta* v. *Texas, supra; Napue* v. *Illinois, supra.* Why should not a lawyer and a political official be accorded the same rights as have been the lay defendants charged with crimes in the above cases?

The general rule which emerges from the cases is this:

> "The due process of law which is protected from state and federal infringement by the Fourteenth and Fifth Amendments, respectively, is denied by a conviction of crime following a trial in which perjured testimony on a material point is knowingly used against the accused, at least where it appears that the accused suffered prejudice by virtue of the use of such testimony." *Annotation,* 2 L. Ed. 2d 1575; See also 3 L. Ed. 2d 1991 and 33 A. L. R. 2d 1407.

Certainly, the prosecutor must be charged with knowledge of the testimony before the Grand Jury in the very same case in which he was actively engaged in prosecuting the accused and seeking conviction. See *United States* v. *Zborowski,* 271 F. 2d 661 (1959 C. A. 2 N. Y.). In the present case, it cannot be denied that the State had actual knowledge of the contents of the Grand Jury minutes; they were used to rebut the affidavit of Peter Calderoni on the Motion for a New Trial. Moreover, Peter Calderoni, whom the State had reason to believe would testify that the 1954 payment was extorted based upon his Grand Jury testimony, was subpoenaed by the State (Supp. D1a; D11a-29 to D12a-6), but was never called to testify. Before the Grand Jury, Peter Calderoni had testified that the 1954 pay-

ment, which he then characterized as extortion (D25a-27 to 30; D32a-16 to 21), but which he later, in his recanting affidavit, characterized as a voluntary contribution (D9a-18 to D12a-10) was $2,000 in amount. Had the State called Calderoni following the perjurious testimony of the Schechters, it would have run the risk of a conflict between testimony of its witnesses as to the amount of the 1954 payment. To do this would have jeopardized the State's case since it would have destroyed the impression left with the jury of the contrast between $150.00 paid in 1954 and $2,000 paid in 1955.

Under the general rule stated, *supra*, it is clear that the prosecutor need not have an evil intent in order that due process be denied. As was stated in *People* v. *Sarrides*, 1 N. Y. 2d 554, 557; 154 N. Y. S. 2d 885, 887, 136 N. E. 2d 853, 854, 855 (1956):

> "A lie is a lie, no matter what its subject, and if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth * * * We may not close our eyes to what occurred; regardless of the quantum of guilt or the asserted persuasiveness of the evidence, the episode may not be overlooked. That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, ~~prevailing~~ deceiving, as it did, a trial that could in any real sense be termed fair." *

In accord, see *Napue* v. *Illinois*, *supra*. Also see *United States* v. *Zborowski*, *supra*, where it is suggested that in a situation like the present case the better practice is that the prosecutor should make the grand jury minutes available to the defense at the end of the direct examination.

There can be no doubt as to the materiality of the $2,000.00 contribution in 1954. This was a factor to be

* Please see also, *People* v. *Radunker* (N. Y. Gen. Sessions), decided January 27, 1961, and after printing of this petition, and not yet officially reported.

properly considered by the trial jury in determining whether a pattern of giving had been established, and whether this giving was voluntary. These are considerations which, if allowed to the jury, would probably have changed the result of the case. However, the cases do not place such a stringent requirement upon the evidence. It is sufficient that it merely goes to impeach the credibility of the witness. As the Court pointed out in *Curran* v. *State of Delaware*, 194 F. Supp. 27 (1957 D. C. Del.), where the suppression of earlier statements was not discovered until 8 years after the trial (at p. 30):

> "What facet of testimony in a case may discredit a defendant or affect his credibility in the eyes of a jury is speculative."

Napue, supra, makes it clear that the use of perjured testimony which goes only to the credibility of the witness results in a "tainted conviction". This Honorable Court reversed the judgment below, stating (at 360 U. S. 269, 3 L. Ed. 2d 1221):

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."

The New York Court in *Savvides, supra*, stated (at 154 N. Y. S. 2d 855; 136 N. E. 2d 854):

> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt".

The law of evidence of the State of New Jersey provides that a witness at a criminal trial may be impeached by self-contradictory testimony given by him before the Grand Jury, *State* v. *Silverman*, 100 N. J. L. 249 (Sup. Ct. 1924). It is clear in the present case that if the Grand Jury testimony of the Schechters was known to the jury at the time of the trial, it would in all probability have destroyed the credibility of the Schechters. See *State* v. *Weleck*, 34 N. J. Super. 267 (App. Div. 1955). It would have shown that the Schechters, rather than the self-proclaimed innocent victims of extortion, were conspirators as charged by defendants in their trial defense. The knowledge of the Grand Jury testimony would have exposed the Schechters as perjurers, attempting to conceal their nefarious plan. With the credibility of the Schechters destroyed, it would follow naturally that the credibility of the defendants, victims of this plot, would be enhanced. It is not for the prosecution, under the circumstances of this case to itself decide nice questions as to the admissibility of evidence and thereby prevent full disclosure to the jury. As was stated in *Griffin* v. *United States*, 183 F. 2d 990, 992-93 (1950 C. A. D. C.):

> "It would be unfair not to add that we have confidence in the good faith of the prosecution. Its opinion that evidence of the concealed knife was inadmissible was a reasonable opinion, which the District Court sustained and no court has overruled until today. However, the case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful."

It is fundamental that no man should be deprived of his life or liberty without due process of law. There is no

reason why an attorney, who from the inception of his right to practice law is sworn to uphold constitutional precepts, should be denied these very same basic rights. Certainly he should not be compelled to live out the remainder of his life as an abject convicted criminal unless a full, complete and honest picture of the entire situation has been given to the jury which convicted him. Under no circumstances should a man be deprived of his life or liberty where evidence which might prove his innocence is willfully suppressed by the prosecution, nor where perjury is condoned by the prosecution.

Conclusion.

In view of the foregoing, petitioners respectfully submit that rights guaranteed them under the 5th and 14th Amendments of the Constitution of the United States have been violated and that the same amounted to a denial of due process of law. In addition, petitioners respectfully submit that the decision of the Supreme Court of the State of New Jersey in this cause is contrary to the applicable decisions of this Honorable Court.

Wherefore, petitioners respectfully pray that the within petition be granted.

David I. Stepacoff,
Attorney for Petitioner,
David Schneider.

Morris Spritzer,
Attorney for Petitioner,
John T. Soja.

APPENDIX.

Opinion of Supreme Court of the State of New Jersey.

SUPREME COURT OF NEW JERSEY.

A-31 September Term 1960.

STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs.

DAVID SCHNEIDER and JOHN T. SOJA,
Defendants-Appellants.

Argued October 24, 1960. Decided November 21, 1960

Mr. WILLIAM D. DANBERRY, Assistant County Prosecutor, argued the cause for plaintiff-respondent. (Mr. EDWARD J. DOLAN, Middlesex County Prosecutor, attorney.)

Mr. DAVID I. STEPACOFF argued the cause for defendant-appellant David Schneider.

Mr. MORRIS SPRITZER argued the cause for defendant-appellant John T. Soja.

PER CURIAM,

Defendants were convicted of extortion. No appeal was pursued. About 31 months later a motion for a new trial was made on the ground of newly discovered evidence. Following the denial thereof an appeal was taken to the Appellate Division where the order was affirmed in a short *per curiam* opinion. Rehearing was applied for and refused. Defendants then appealed to this Court, alleging that the original conviction resulted from the use of perjured testi-

mony by the State and therefore constituted a denial of due process.

Our examination of the record satisfies us that the alleged constitutional issue is without substance. Consequently, appeal does not lie as a matter of right under *R. R.* 1:2-1(*a*). Nonetheless, we have studied the basic merits of the appeal and have reached the conclusion that the actions taken by the Appellate Division were correct.

The judgment is affirmed.

A True Copy

JOHN H. GILDEA,
Clerk.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 702

DAVID SCHNEIDER and JOHN T. SOJA,
Petitioners,

vs.

STATE OF NEW JERSEY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. 702

DAVID SCHNEIDER and JOHN T. SOTO,

Petitioners,

vs.

STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

I

Reference to Official Reports of Opinions Delivered in the Court Below*

The petitioners' reference to the opinions below is correct. However, the opinion below has been officially reported in *State v. Schneider*, 32 N. J. 551 (1960).

The State's brief below is available to this court, if this court desires it to be filed.

The State's brief in the Appellate Division of the Superior Court of New Jersey was also a printed brief and is also available to this court, if this court desires it to be filed.

II.

Counter-Statement Concerning Jurisdiction

Counsel for petitioners state (Petition, p. 1 & p. 2) that jurisdiction is invoked under the 5th and 14th Amendments to the Constitution of the United States alleging that due process was denied in the State's courts below by reason of the knowing use by the State prosecutor of perjured testimony against the defendants. They also state that due process was denied by the knowing suppression of evidence favorable to the defendants.

The State denies these charges and the factual record as will be shown does not support them.

The charge of suppression of evidence favorable to the defendants was not briefed or argued by the petitioners below.

If this court has jurisdiction it must be invoked as authorized by 28 U. S. C., Sec. 1257 (3).

We respectfully concede that if perjured material testimony as claimed was knowingly used by the State at petitioners' trial in the first instance, and if the New Jersey Supreme Court below, despite that situation in the trial court, refused to reverse and set aside the decision against petitioners there, then jurisdiction is, undoubtedly, in this court.

We respectfully submit, however, that no federal right, privilege or immunity, was determined below, either by the Appellate Division of the Superior Court or by the Supreme Court of New Jersey, nor did it decide any federal

of substance not heretofore determined by this court, or contrary to the applicable decisions of this court.

We further respectfully submit that the decision below is in conformity with the provision of the Federal Constitution respecting due process and equal protection of the laws as guaranteed by the United States Constitution, and presents no departure from the applicable decisions of this court.

We further respectfully submit that the State Courts below were duly decided factually against the defendants passing upon factual matters they were petitioned by them to pass upon.

We therefore respectfully submit that this court should not entertain jurisdiction and hence a writ of certiorari to review the decision of the Court below.

Counter-Questions Presented

A. Was perjured testimony knowingly used by the State at the trial at which defendants petitioners were convicted of extortion?

B. Was perjured testimony used by the State at the trial at which defendants petitioners were convicted of extortion?

State's Contention Summarized

The State's position is that no perjured testimony was used, knowingly or otherwise, and that heretofore no substantial Constitutional issue was presented below.

The entire testimony that is alleged to support petitioners' petition to this court, both before the grand jury and the trial jury has been set out on pages 40, 41, 42, 43, 44 and 45 of this brief. It does not in any way support an allegation of the use of perjured testimony [illegible]

Counter-Statement of Case

David Schneider and John T. Soja were each convicted of the crime of extortion by demanding and receiving $2000.00, from Morris Schechter and Charles Schechter, on or about *April 19, 1955*, under the color of their respective offices as Borough Attorney and Borough Councilman of the Borough of South Plainfield, to obtain favorable consideration of an application for the issuance of a junk yard license made by Al Perma and Lester Chiappi, then pending before the Borough Council. The indictment (No. 14,518) was in two counts; the first count charged Schneider with extortion, the second count charged Soja of the identical offense. They were jointly tried before Superior Court Judge Howard Ewart and a jury, and convicted on March 15, 1956; *both applied for a new trial on the ground of newly discovered evidence, approximately two and one-half years later.*

The moving affidavits for the motion, other than the defendants, were those of Peter Calderoni, Lester Chiappi, John Pellegrino, Cobern S. Mason and Joseph Zuguda.

It was on these affidavits and the answering and counter-affidavits that the motion was denied. The court did permit the use of the grand jury testimony of Calderoni and both Schechter brothers on the motion. The lower court, in its discretion, denied the motion for a new trial.

Defendants appealed to the Appellate Division of the Superior Court alleging that the denial of their motion for a new trial constituted an abuse of its discretion. The lower court (trial) filed an opinion in support of its ruling denying the motion (See Petitioners' Appx. 195a to 198a).

The Appellate Division in a *per curiam* opinion affirmed the denial of [illegible] motion for a new trial.

tially for the same reasons given by Judge Coyle in the court below (D. Supp. App. 2a).

Defendants then applied for a rehearing before the Appellate Division of the New Jersey Superior Court, and that court denied such application June 15, 1960, and in a letter (P. Supp. App. 4a), stated that it rejected "as factually incorrect that there was any curtailment of the time allowed to defendants' counsel for oral argument". The Appellate Division Mandate of Affirmance issued May 5, 1960.

Defendants next appealed to the Supreme Court of New Jersey as of right, upon the sole ground that they were prejudiced by the denial of a fair trial in violation of the due process clauses of the *Fourteenth and Fifth Amendments of the United States Constitution*, alleging that perjured testimony was knowingly used by the State to obtain their convictions. *N. J. Const. Art. VI, sec. V, par.* 1(a); *R.R.* 2:2-1(a).

Defendants' brief in the Appellate Division was 111 pages long and contained three points. Point III, thereof, contained three short paragraphs, seven lines of which were devoted to charging the State with the alleged *suppression* of the testimony of Morris Schechter and Peter Calderoni directly bearing on the *1951 grand jury* as a violation of due process and it cited three federal cases (Appellate Division Brief, Db110-30, Db111-17).

The Supreme Court of New Jersey affirmed the decision of the Appellate Division of the Superior Court of New Jersey. That Court's examination of the record unanimously satisfied it that the alleged constitutional issue was without substance under its rules, *R.R.* 1:2-1(a). None [illegible] Supreme Court of New Jersey studied the basis [illegible] of the record and determined that the acts taken [illegible] by the State Department of Law & Public [illegible] N.J. 451 (1960).

Petitioners then filed their petitions for a Writ of Certiorari in this Court.

Defendants both testified at their trial. By their own admissions they received the $2,000.00, but claimed it was a voluntary campaign contribution; however, when originally questioned by Captain Simpson they denied ever having received the $2,000.00. "Had no knowledge of it" (P239a-18). Both were very poor witnesses.

Mr. Abe Silverstein, an attorney at law, who testified for the State, gave damaging evidence against them. He represented Perma and Chiappi who were buying Schneider's business and would not do so until the junk yard license could be straightened out "if I get the boys together and send them into see him". Mr. Silverstein then told the boys (the two sellers and the two purchasers) to see Mr. Schneider (P183a to P186a).

The State's case was a strong one, and defendants were not good witnesses for themselves. Schneider denied Mr. Abe Silverstein's testimony and destroyed his own credibility. Defendants evidently feared the strength of his testimony and did not cross-examine him. The so-called campaign book, S 6, greatly strengthened the State's case as Schneider's alleged voluntary contribution was not entered in it because defendant was "too busy" (P236a to 10).

Captain Simpson's testimony and Captain Eng[illegible] testimony was that both Schneider and Soja stated in the Prosecutor's Office on the evening of April 30, 1965, when questioned in Captain Simpson's presence, that they had not received any money from either of the Schneider[illegible] *any* purpose, and that they had not received $2,000.00, and had no knowledge of it. When Schneider's office was being searched, he denied he had it but after it was found he then admitted it was the money in $100.00 bills.

Soja's testimony was no better than Schneider's. He also denied, at first, that he had received the $2,000,00, from the Schechters; admits he denied it and states he denied it, because the Prosecutor, Mr. Elger, was of the opposite political party (P359a *et seq.*).

Schneider also denied that he had received the $2,000,00 because the Prosecutor then investigating the matter was of the opposite political party (P357a-18 to 31; P359a 25 *et seq.*).

The amounts of money defendants claim were voluntarily given are incredible when considered in the light of the $100,00 and $50,00 gifts they did make.

To have a complete, clear and logical understanding of this case in its entirety it is respectfully suggested that the court read first the grand jury testimony of Morris Schechter (P3a *et seq.*), Charles Schechter's (P13a *et seq.*), and Peter Cabieroni's (P22a *et seq.*), the transcript of the trial P7a *et seq.*) and finally the affidavits for and against the motion (P31a *et seq.*).

Morris Schechter testified before the grand jury that [illegible] he was in the army, 1962-1964, his brother, Charles Schechter, was left by him to run the business with Cabieroni; that he only knew of the *1962* payment from what Cabieroni and his brother, Charles Schechter, told him about it, i.e., that they had to pay $2,000,00 in order to avoid being bothered by Borough officials. He testified at length, however, to the *1963* payment [illegible] to Soja, to its original payment, its addition to him and his brother, Charles, and its repayment to Soja to Schneider (P3a to P22a). Morris Schechter also testified at the trial (P10a *et seq.*).

Peter Cabieroni testified before the grand jury that he [illegible] Morris Schechter told him that he got out of the business as he was

practically forced out, because he couldn't keep paying Schneider and Soja. That while Morris Schechter was in service Charles Schechter ran the business with him for Morris Schechter, and that he, Calderoni, got out by selling his interest to Charles Schechter for $5,000.00. That Schneider told him that there would always be trouble going on, that the committee needed (some money) $5,000.00, and that he said this in Soja's presence. He further said that they gave them $2,000.00. This was in *1954*, before he got out of the business in *1954* (P22a to P30a). He said also that he did know what was given them after he had gotten out (P30a 30 to 40). This was the $2,000.00 paid in *1954*, about which payment no indictment was returned (P22a to P30a). *Calderoni did not testify at the trial.*

Charles Schechter testified before the grand jury as to the payments of *1954* and *1955*. He also testified to the return to them of the *1955* $2,000.00, and its repayment to defendants on *April 28, 1955* (P33a et seq.). When questioned as a rebuttal witness at the trial, as to whether or not the Schechters gave a *1954* political contribution to defendants (in 1954) of $4,000.00, he denied it. His position was that the only *1954* contributions were one of $100.00 and one of $50.00 (P474a to P475a 40).

This is what defendants claim to be the perjured testimony knowingly used by the prosecution.

Factually the situation is clear, there were two payments of $2,000.00 each: one paid in *1954*, while Calderoni was in the business, and one paid in *1955*, after Charles Schechter bought him out. According to the testimony before the grand jury, both were claimed to have been extorted.

The [illegible] payments made to defendants [illegible] one of $4,000.00, and one of $2,000.00.

[illegible]

echter was in the army; the details of which were testified to before the grand jury by Calderoni and Charles Schechter. In following the original record of the trial for the 1953 extortion, of which defendants were convicted, three important dates stand out and must be remembered:

1. Defendants' first receipt of $2,000,00 from the Schechters on *April 20, 1953.*
2. The return to the Schechters of that $2,000,00, on *April 25, 1953.*
3. The receipt for the second time of the sum of $2,000,00, on *April 28, 1953.*

IV

Summary of the Argument

We respectfully submit:

A. That the factual situation in this case did not bring the case within the decisions of the courts cited and referred to in both petitioners' and respondent's brief.

B. That no perjured testimony was knowingly, or unknowingly, used or suppressed, as alleged by petitioners in their petition and no constitutional question of substance, or otherwise, is before this court.

C. That the State court is fully in full accord with the decisions of this court, and any factual petition claims to be [illegible] and frivolous.

V

The Argument

POINT ONE

A.

There was no perjured testimony used to obtain defendants' conviction.

During the proceedings on defendants' motion, in the trial court, for a new trial on the ground of alleged newly discovered evidence, the testimony of the witnesses before the Grand Jury that returned the indictment upon which these defendants were each convicted was, by consent, opened to inspection. Defendants now argue that the testimony of Morris Schechter and Charles Schechter before the Grand Jury sustains their contention that Charles Schechter perjured himself at their trial on this indictment and that the State at that trial knowingly used such perjured testimony of *Charles Schechter* to convict them. Morris Schechter's part in this charge is a small one. He is not accused here by defendants of perjury at the trial.

Morris Schechter testified before the Grand Jury on May 3, 1955, as follows, concerning the 1954 payment to defendants (P3a-32 to P4a-23):

> "Q. Now, when you returned from service did you resume your association with your brother in the junk yard in South Plainfield? A. Yes, I did.
>
> Q. And when you returned from the service after you resumed with your brother did you have any difficulty with any of the officials in South Plainfield with respect to your junk yard? A. Yes, I did.
>
> Q. Will you please tell the members of the Grand Jury what difficulties you had, and what happened [illegible] I was in the Army I [illegible]

were having trouble with the junk yard. I couldn't keep my mind on my work or anything else while I was there. I couldn't wait until I got home.

And when I did get home they told me they were going to have to—they had a lot of trouble with the borough, and they had to pay over $2,000.00, in order to stay there. And then they are supposed to give them another $1,200.00 after they had gotten straightened out and gotten another piece of property so they can reopen up.

Q. When was this, in 1954? A. Yes, when I first came home.

Q. You didn't actually see or participate in any payoff to anyone in 1954? A. No, I didn't.

Q. You were informed by your brother and Calderone that they had to pay $2,000.00 in order to avoid being bothered by the borough officials? A. That is right.

Q. Did they inform you what borough officials they were being bothered by and who they had to pay the money to in 1954? A. Yes, they told me that the chief of police kept coming in there and giving them trouble, the guy with ears on the road. And that they had to give the money to Dove Schinella and Dorothy Sojat and they were to keep going.

Q. Now, in 1955 did you [illegible] A. No, I [illegible]

Q. Who did you give any money to; and what? A. We gave the money to Mr. Schneider. He took the money, and Mr. Soja was with him in his car to his home.

Q. And when was that, do you recall? A. Well, that was just before there was some ordinance supposed to have been passed.

Q. And ordinance in connection with what? A. With junk yard. It wasn't only with our junk yard; it was for all junk yards.

Q. Had the ordinance been passed at that time? A. No, it hadn't.

Q. Well, the ordinance dealing with junk yards I think was passed in March of 1954. Was it before that date? A. Yes, it was. It was before the ordinance was passed.

Q. And tell us as best as you can what took place between Schneider, Soja, and yourself and Gabel as far as the payment of $2,000? A. Well, Mr. Schneider came over. I don't remember who came first, whether it was Mr. Soja or Schneider came into the yard and said they wanted to see us. But anyway that night we went over to Mr. Soja Mr. Schneider's home, and he took us in the bar that he had. It is a big room with a bar, and we sat down.

And he says, 'Now look, these things cost money. We are trying to help you.'

He said, 'And if there is any way that you will work this out.'

So, I said: 'Well, what do you mean?'

Well, he said, 'This thing' he mentioned a four-letter word. Should I mention it?

Q. I will try to interpret it for you. A. He said, 'You can't do this with Bilkis.'

Mr. Elser: Bilkis have always [illegible] generally interpreted as 'robbing.' We don't work for nothing.

A. So, he asked us that time. I said, 'Well, what is it going to cost.' He said: 'We will try to help you. We will try to get you another piece of ground where you can move.' And he said, 'In an industrial area where it will be satisfactory to you.' So, I said, 'Well, what is that going to cost.' He said, '$5,000,' —at that time? But I said, 'My brother is in the Army, and that is a lot of money. I can't afford no $5,000.' So, he did come down to $3,000. And I told him 'Well suppose we make it $2,000, and after they do give us the other piece of ground' —we would give them another $1,000.

Well, they did go out looking with me for a piece of ground, but the ground they wanted to give us was in a spot where nobody could ever drive in.

So, I told them—I said, 'Gosh, we are in the junk business. A person comes for a dollar or a two dollar part they would rather go buy a new part than drive in here. This isn't good for us.'

Q. Well, without going into too much detail, did you finally give Soja or Schleifer $2,000? A. Yes. The next day I called up my partner, Pete Calderoni, went to his house as we were supposed to, and we gave him $2,000. And I even told him at that time I said 'Gee, we worked hard for this money. I hope everything will be okay.'"

A Grand Juror asked Charles Schleifer about the [illegible] payment (P20a 17 to 20):

"A Juror: Charles, I would like to ask you, I believe you stated that back in 19[illegible] Was I correct in that?

The Witness: That's right.

The Grand Jury Foreman: [illegible]

The Foreman: [illegible]

The Witness: Yes."

No indictment was returned regarding the 1954 $25,000 payment.

At the trial of these defendants, on the trial of the indictment returned for the 1953 extortion of $2,000,000 from the Schechter brothers, Charles Schechter testified in rebuttal as follows (P474a-1 to P477a-40):

"Q. Mr. Schechter, I show you a check and ask you what this is?

Mr. Toolan: If your Honor please, object; not in buttal.

A. This is—

The Court: It doesn't sound like rebuttal from here. Is it?

Mr. Molineux: Yes. It has to do with the campaign contributions, if your Honor please. The testimony on the defense was the fact that an alleged one thousand dollar campaign contribution was given.

The Court: All right. It is proper in that sense.

Q. I ask you what that is? A. That is one hundred dollars that I gave to the Democratic party as a contribution.

Mr. Molineux: I offer it in evidence.

Mr. Toolan: I have no objection.

The Court: What is the date of the check?

Mr. Molineux: September 24th, 1954, payable to the order of cash.

(Check entered in evidence and marked Exhibit S-7, March 15th, 1956, G.D.Z.)

Mr. Molineux: May I call to the Court's attention and the jury's attention, the endorsement, Dorothy Schneider, campaign manager, Maude E. Crass, endorsed on the back.

The Court: Show it to the jury. It is in evidence.

Q. In 1954 did you make any other contribution to the Democratic campaign? A. Fifty dollars.

Q. How was that paid? A. I don't remember, whether it was check, or whether it was cash.

Q. Did you look for a check? A. Yes, and I couldn't find the statement.

Q. Did you make any other campaign contribution to the Democratic party in 1954? A. No, I didn't.

Q. Was there any campaign contribution made?

Mr. Molineux: Strike that out.

Q. It has been testified to that a campaign contribution of one thousand dollars was given by the Schechter brothers in 1954 to the Democratic campaign. Was there any such contribution? A. That is not true. We never gave such a contribution.

Mr. Molineux: That is all.

Mr. Toolan: I have no questions.

By the Court:

Q. You say you gave no campaign contribution of one thousand dollars in 1954. Did you give one thousand dollars in 1954? A. We didn't give any one thousand dollars in 1954, or any other year.

Q. I think you testified the two thousand dollars—A. We did give—

Q. Just a moment. I think you testified the two thousand dollars you gave Mr. Schneider on April 20th, 1955, was in cash? A. That is right.

Q. Why didn't you give him a check? A. Well, he wanted the cash.

Q. How do you know he wanted the cash? A. Why, at the time that me and Lester Chait came into his office, he said right there, "Are you bring me the cash?"

The Court: All right.

Mr. Toolan: No questions.

Mr. Spritzer: No questions.

The determination of whether $2,000.00 or $1,950.00 was given to Schneider and Soja in *1954* has no bearing on the *1955* extortion, unless it was freely and voluntarily given in *1954*. The fact that the Grand Jury could also have indicted on the *1954* payment of $2,000.00, has no bearing on the *1955* conviction.

The Grand Jury testimony of the Schechters could have helped these petitioners, as it would have shown that they also extorted from the Schechters in *1954*, even though they were not indicted for that extortion.

Schechter's testimony is clear and is that $150.00 were genuine campaign contributions and not extorted. He did not, and would not, admit that he gave $2,000.00 for the *1954* campaign fund. However, he was never asked if defendants were paid more money by Schechter than the $150.00, outside the campaign reference. Nowhere does Schechter contradict his grand jury testimony.

The so-called use of perjured testimony of Chief Schechter by the State is that Schechter would not, and did not, admit that he gave any money to defendants in 1954 for campaign contributions, except the $100.00 check and the additional $50.00 cash, or check. He was never asked if he made any payments of money to defendants in 1954 other than the $100.00, and the $50.00 above referred to. He did testify that this $100.00 check and the $50.00, cash or cash, were *1954* campaign contributions, and that he made no other campaign contribution in 1954 (P474a to P475a 40).

When asked by the court (P475a 24), "Did you give one thousand dollars in 1954?" He answered, "Why, I don't give any one thousand dollars in 1954, or any other year." He was never asked if he made a $2,000.00 payment to Schneider in 1954. He was only questioned about campaign contributions."

During the trial, the trial judge asked the following questions:

> "Q. I think you testified the two thousand dollars—
> A. We did give—
> Q. Just a moment. I think you testified the two thousand dollars you did give Mr. Schneider on April 20, 1955, was in cash. A. That is right." (1947a-27).

It is likely that the witness was going to explain here the $2,000.00 payment. No one was apparently interested in it then. They cannot have it both ways, now.

It is upon this background that the question of whether that defendants' cause lacks the use of perjured testimony by the State at defendants' trial.

In the Appellate Division brief, defendants charged the suppression of evidence and the use of perjured testimony knowingly used by the State as charged here. Suppression of evidence sufficient to vitiate the conviction must be shown to have been material to the issue being tried. The mere fact that the State did not reveal on the trial payment of $2,000.00 to Joel Blum, a co-defendant, was not material to his guilt for extorting $20,000.00 in 1955.

In *Gordon v. Hudson*, 234 U. S. 103 (1955), 79 L. Ed. 231 (1935), cited by petitioners' Petition, p. 11 and 18, the United States Supreme Court said, in reversing that a criminal conviction stood only [illegible] by the knowing use of perjured testimony [illegible] of the process [illegible] *Jacobson*.

[illegible] *Peters v. Kiff*, 407 U. S. 493, 33 L. Ed. 2d 83 (1972) [illegible] that case, where the [illegible]

perjured, and by the deliberate suppression of [illegible] favorable to him; and was accompanied by documents copies of supporting affidavits containing specific allegations that the persons named were coerced to testify falsely and that the testimony of certain other persons material to the defense was suppressed under threat and coercion by the State; and that the record of the subsequent trial and conviction of another for complicity in the same crime revealed that the testimony there presented was inconsistent with the evidence presented at petitioner's trial, and clearly exonerated petitioner; such petitioner is entitled to a determination of such allegations on hearing.

This case is not in point. Our defendants have already had such hearing. It was from such final determination against them on that hearing that they took their appeals through the New Jersey Court system.

It, of course, does support the principle that the deliberate suppression by prosecuting officials of evidence favorable to a defendant may violate the due process clause of the Federal Constitution.

Hallv. Rhay, 324 U. S. 760, 89 L. Ed. 1348 (1945), cited by petitioner (Petition pp. 11 and 18), considers a situation where it was alleged on petition for a writ of habeas corpus that defendant's conviction was obtained by use of false testimony [illegible] by the prosecuting attorney by bribery of witnesses, and misconduct at the trial with [illegible] was false.

[illegible]

[illegible] 28, 2 [illegible] Petition, pp. 11 and 18). In that case [illegible]

"Q. Have I promised you that I would recommend any reduction of sentence to anybody?

A. You did not."

That answer was false and known to be so by the prosecutor.

After Napue's conviction, the lawyer who became Assistant State's Attorney had prosecuted Napue and who was involved, filed a petition on behalf of the witness who testified pursuant to promises had been made to him, in which petition he alleged that he had promised him (Hamer) that if he would testify against Napue "a recommendation for reduction of (Hamer's) sentence would be made and possibly effectuated" and asking that the court affirm the enforceability of the contract entered into between the authorized representatives of the State of Illinois and George Hamer."

The case does definitely hold:

1. "That a conviction obtained through the use of false evidence, known to such by representatives of the State, must fall under the Fourteenth Amendment."

2. That in cases in which the issue is a matter of degree of guilt or the severity of punishment, there is a denial of due process when the State, although not soliciting false evidence, allows it to go uncorrected when it appears."

In re Ivan Vasser, 7 N.J. 225 (1951), cited by petitioner at page 15 of his brief, is also inapposite. The [illegible] Napue [illegible] Vasser [illegible] Napue [illegible] Vasser [illegible]

Klotz v. Lee, 21 N. J. Eq. [illegible] (1870), cited by petitioners [illegible] (Petition, p. 16), is not [illegible] that cannot [illegible] [illegible] [illegible]

First National Bank at Freehold v. *Vreeland*, 60 N. J. Super. 221 (App. Div. 1960), cited by petitioners (Petition, p. 17), deals merely with procedural matters, holding as it does that where an alleged insufficiency of service based on matters *dehors* the record is raised, the challenge to service against sufficiency of service may in an appropriate case be raised by motion and resolved on affidavits, but such procedure may not be followed where a sharp factual dispute exists.

No such sharp dispute of fact exists in our case; it merely involves an interpretation of the testimony before the Grand Jury and at the trial, and in no way substantiates the construction petitioners seek to place upon it.

In *United States* v. *Zborowski*, 271 F. 2d 661 (2 Cir. 1959), cited by petitioners (Petition, pp. 18-19), *Zborowski* was tried for perjury in a Federal Court in violation of 18 *U.S.C.* 1621, and claimed, among other things, that it was error for the trial judge to refuse to examine and make available to the defendants the grand jury testimony of Jack Sobie, the principal government witness, and on this ground alone it reversed. This case actually involves strictly federal procedure and the practice in that Circuit (2nd) to permit defense counsel to use inconsistent grand jury testimony for impeachment purposes. The rule there being that, when defendant points out a possible inconsistency between the trial and grand jury testimony of a government witness and requests the trial judge to examine the witness' grand jury minutes, the trial judge must then read the minutes *in camera, and having and stating his conclusion*, he must make available to the defendant the minutes, or any intelligible segment thereof, containing the inconsistency. Where the trial judge finds no inconsistency, he should and will request seal the grand jury testimony so that it is available on appeal.

This case is quite [illegible] and throws no light on our situation.

In *People v. Savvides*, 1 N. Y. 2d 554, 154 N. Y. S. 2d 888, 136 N. E. 2d 853 (1956), relied by petitioners (Petition, pp. 19-20), defendant was convicted of feloniously possessing a narcotic drug with intent to sell, and sought reversal on the ground that the principal witness against him testified falsely to the knowledge of the prosecutor who stood silently by. One Mantzinos was arrested while picking up a quantity of marijuana from a locker in a New York City bus terminal. He implicated defendant, Savvides, as the one from whom he had obtained the narcotic drug. Mantzinos pleaded guilty to the charge of felonious possession with intent to sell, which carried a mandatory minimum sentence. The District Attorney informed the court that the plea was taken with the "understanding" that, upon Mantzinos' continued truthful cooperation, the district attorney would "permit" him to withdraw it and plead guilty to a lesser crime, one carrying no mandatory minimum penalty.

At Savvides' trial, before a different judge, Mantzinos testified against him and, when questioned as to his understanding with the district attorney, as to the consideration promised for his continued cooperation, he denied that he expected "any more favorable treatment" in return for his testimony. He [illegible] who had made the arrangement, then in charge of the case remained silent. A few days later the jury found Savvides guilty and the district attorney's agreement with Mantzinos was carried out. Defendant's motion for a new trial was denied and the Appellate Division affirmed. The New York Court of Appeals reversed.

In *[illegible]* [illegible]

perior Court of Delaware, asserting that at their trial they were denied their constitutional rights. It was dismissed without prejudice on the ground that the proper remedy was to proceed under Rule 35 of the Delaware Criminal Rules of Procedure, and not by petition for writ of habeas corpus. They then proceeded under that rule which provides for post conviction remedies. Relief under Rule 35 was denied by the Superior Court of Delaware, and the Supreme Court of Delaware affirmed its denial of the relief sought and held that no constitutional rights, State or Federal, had been violated. The petitioners then filed a petition for a writ of certiorari with the Supreme Court of the United States. It denied the writ. The matter before the United States District Court was on application for writ of habeas corpus. The issue was whether false and evasive testimony of a police officer in a criminal case deprived defendants of constitutional due process when such testimony serves the threefold function of being cumulative evidence of the State's case in chief, of suppressing evidence which the defense was entitled to use as it saw fit, and finally of impeaching the credibility of the defendants. The issue was not one of guilt or innocence of these defendants. The court held that where, as here, each of the defendants had signed two statements and the police officer in charge of the criminal investigation testified that there was only one statement signed by each defendant and that was the statement admitted in evidence, the effect of the conflicting testimony was to suppress facts surrounding the additional statements, to deprive defense counsel of right to make such use of statements as might have been in defendants' interest and contradiction in testimony served to permit State to impeach the defendants' credibility by effective collateral attack, and police officer's denial of existence of additional statements constituted fundamental unfairness in the trial of a criminal case within the due process clause of the *Fourteenth Amendment*. It allowed the writ.

State v. *Silverman*, 100 N. J. L. 249. (Sup. Ct. 1924), cited by petitioner (Petition, p. 21), held that a witness may be impeached in any trial, civil or criminal, by self-contradictory testimony previously given by him before the Grand Jury is, of course, conceded as good law. In that case, it was held reversible error for the trial court to prevent the complaining witness being asked, upon cross examination in the trial of defendant for embezzlement, whether he remembered telling the grand jury that defendant had offered to return to him the money alleged to have been embezzled but that he had refused to accept it.

State v. *Weleck*, 34 N. J. Super. 267 (1955), cited by petitioners (Petition, p. 21), as an opinion of the Appellate Division (it was an opinion by the Bergen County Court) is not in point here, although its soundness is not disputed.

Griffin v. *United States*, 183 F. 2d 990 (C. A. D. C. 1950), cited by petitioners (Petition, p. 21), is not in point and is actually authority against their position as argued here and below.

In *United States* v. *Rutkin*, 212 F. 2d 641 (3 Cir. 1954), the Court of Appeals said, page 643 [1-2]:

> "Further, it is clearly established that an appellant must do more to avoid his conviction than to show the conviction was secured by perjured testimony. He must also show that the prosecution used such testimony knowingly. *Mooney* v. *Holohan*, 1935, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791; *Cobb* v. *Hunter*, 10 Cir., 167 F. 2d 888, certiorari denied 1948, 335 U. S. 832, 69 S. Ct. 19, 93 L. Ed. 385; *Ruby* v. *United States*, 10 Cir., 1952, 198 F. 2d 199."

and it also held that:

> "The deliberate suppression by the prosecution of evidence favorable to a defendant may constitute a denial of due process."

It cited in support of such proposition, *Pyle* v. *Kansas*, *supra*, and directed that the case be returned to the District Court for a hearing on the allegations of the motion, and ordered the United States Attorney to produce the statements of Zwillman and Stocker, if such exist, for the inspection of the court, which after considering all the circumstances, including the materiality of the statements and whether the information contained therein was available to defendant during the trial, should decide whether Rutkin's constitutional rights were violated.

B.

The State could not have shown that these defendants had on an earlier date committed a similar extortion.

The general rule in New Jersey is that upon the trial of a person for one crime, evidence that he has been guilty of other crimes is irrelevant and inadmissible by the State. *State* v. *D'Amato*, 26 N. J. Super. 185 (App. Div. 1953); *State* v. *Samurine*, 47 N. J. Super. 172 (App. Div. 1957); *State* v. *D'Ippolito*, 19 N. J. 540 (1955); *State* v. *DePaoli*, 5 N. J. 1 (1950); *State* v. *Schneider*, 5 N. J. 40 (1950); *State* v. *Sinnott*, 24 N. J. 408, 414 (1957).

In *State* v. *D'Amato*, 26 N. J. Super. 185 (App. Div. 1953), the Appellate Division reversed defendant's conviction of bookmaking because the arresting officer testified that the last time he testified as a so-called expert, had been in the last case against this same defendant.

In *State* v. *Kociolek*, 23 N. J. 400 (1957) [9], p. 420, the Supreme Court of New Jersey held it was error to receive the evidence of prior crimes which the accused had not been convicted.

Even if the testimony of the commission of an earlier 1954 similar offense was admissible to show or to develop

common "scheme" or "plan;" *State* v. *Noel*, 102 N. J. L. 659 (E. & A. 1926), or to show that defendant committed other crimes of a like nature, *Bullock* v. *State*, 65 N. J. L. 557 (E. & A. 1900), could have been admitted, there was no injury done defendants in not offering it and thus endangering the verdict. Certainly defendants cannot be allowed to say that the State must call the payments defendants received "campaign or political contributions," or donations, simply because defendants say they were such, or call them such.

State v. *Dietz*, 5 N. J. Super. 222 (App. Div. 1949), involved a conviction of lewdness. At the trial, a statement of the defendant was admitted in which were references to previous offenses which were prejudicial to defendant. The court on appeal held this evidence inadmissible and reversed the judgment below. *State* v. *Dietz*, *supra*, is cited with approval by the Supreme Court of New Jersey in *State* v. *Marchand*, 31 N. J. 223 (1959), p. 230, where the court said:

> "This reasoning is peculiarly applicable to the instant case and the mention of the prior fire was not admissible under any exception to the general rule. See also, *State* v. *Dietz*, 5 N. J. Super. 222 (App. Div. 1959). And is likewise inadmissible to effect the credibility of defendant. *Kociolek* case, *supra*, 23 N. J., at page 418."

Defendants argued below, "Why didn't the Schechters (only one could have testified about it; the other one was then in the army) testify before the trial jury that the sum contributed in *1954* was involuntary, if this were the fact as they alleged before the grand jury?"

If defendants really wanted this evidence, they could very easily have gotten it on the cross-examination of Charles Schechter. Why didn't *they* question *him* about it? Undoubtedly, because they knew his answer would be, all amounts other than the two small ones of $100.00, and

$50.00, were involuntary; coerced out of them and not voluntary campaign contributions at all.

If the prosecutor during the trial had asked the witness, Charles Schechter, if in *1954* he paid money, $2,000.00 to defendants, for reasons similar to the *1955* payment, he would have jeopardized the verdict of guilty to the *1955 extortion* for the reason that such *1954* payment was not connected in anyway with the *(1955)* charge in the indictment, was irrelevant to the issue then being tried and was incompetent to be shown on the trial of the *1955* charge, and would have constituted reversible error, under the decisions of the Supreme Court of New Jersey. Defendants themselves could not be questioned by the prosecutor as to this earlier payment without likewise violating defendants' rights, as such effort would have been an attempt to prove them guilty of another (previous) crime, not charged in the indictment.

However, defendants knew what other money they, or either of them, had received from the Schechter brothers or Calderoni. Represented as they were at their trial by eminent and thoroughly capable and experienced counsel, it is naive of them to say they would have been permitted, at their trial, evidence of earlier payments to them, when that testimony would clearly have been to the effect that such earlier payments had also been extorted. Since these defendants knew what they had received, why did they not bring it out? Obviously because Schechter and Calderoni claimed, and would have testified in rebuttal, that it also had been extorted.

Defendants both could have testified to the *1954*, $2,000.00, payment. They chose not to do so. We now know, since the inspection of the grand jury testimony, that both Charles Schechter and Calderoni, when before that grand jury, testified that the *1594*, $2,000.00, payment was not voluntary. Calderoni swore that he got out of the business because of such compulsory payments. Had the prosecu-

tion attempted to have Schechter testify at the trial about the *1954* payment, it would have been improper and would have prejudiced these defendants, by showing another similar offense; a similar and distinct separate offense in *1954;* one for which the same grand jury could also have indicted these defendants.

A study of this case shows conclusively, that both before the grand jury and at the trial of defendants, Charles Schechter would, and always did testify, that both the *1954*, $2,000.00, payment, and the *1955*, $2,000.00, payment by them were involuntary and extorted.

Perjured testimony knowingly used by the State has not been established in this case. On the contrary, it has *not* been established that Charles Schechter testified untruely when he denied that the Schechters made a $1,000.00 campaign contribution in *1954*. It is not defendants' contention that they did receive a $1,000.00 contribution from the Schechters. It is their contention that the $2,000.00 payment to them in *1954* was a voluntary campaign contribution. Schechter never referred to it before the grand jury as a compaign contribution, or donation. Had he been directly asked about the *1954*, $2,000.00, payment, there is no reason to believe he would commit perjury about it.

The record (P474a to P475a), shows that defendants' counsel was not greatly interested in the *1954* payment. They did not cross-examine Schechter on this at all. The questions that were asked were by the prosecutor and the court. They, seemingly, had the best of reasons for not going into the *1954*, $2,000.00, payment to defendants.

It would seem from defendants' argument here, that defendants would confine the witness, Schechter, on the stand, to calling the *1954*, $2,000.00, payment a "campaign contribution" (carrying as that term does, the suggestion of a voluntary gift) but that the State could not bring out from Schechter the true corrupt nature of its payment.

Our case does not show perjured testimony knowingly used by the State to convict these defendants. It does not even show that perjured testimony was used at all in this case. The due process clause of the *Fourteenth Amendment of the National Constitution* was not violated here.

Defendants have failed to show here any perjured evidence knowingly used by the prosecution, and defendants are not within the scope of the United States Supreme Court cases cited in their brief. In those cases, perjury was definitely established and so was the fact that it was knowingly used by the prosecution. How can that be said of the prosecution in our case?

CONCLUSION

Petitioners' effort to bring the case at bar within the scope of the review power of this court as shown, *supra*, is actually frivolous and without merit. The question of alleged suppression of evidence was never raised in the Supreme Court of New Jersey below, while the question of the knowing use of perjured testimony is factually untrue and not substantiated by the record. The decision of the Supreme Court of New Jersey was in full accord with the decisions of this Court.

We submit that no substantial federal question meriting review by this court has been raised in the case; for this reason, and for the other reasons hereinbefore set forth, it is respectfully submitted that the petition of David Schneider and John T. Soja for a writ of certiorari should be denied and dismissed.

Respectfully submitted,

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WILLIAM D. DANBERRY,
Assistant County Prosecutor,
Of Counsel and on the Brief.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 702.

DAVID SCHEUER AND JOHN T. SOFA,

Plaintiffs in Error,

vs.

STATE OF NEW JERSEY,

Defendant in Error.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 702.

DAVID SCHNEIDER and JOHN T. SOJA,

Petitioners,

vs.

STATE OF NEW JERSEY,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

The State, in its Counter-Statement concerning the jurisdictional phase of this cause, on Page 2 of its Brief in Opposition to Petition for Writ of Certiorari, states:

> "The charge of suppression of evidence favorable to defendants was not briefed or argued by the petitioners below."

It is beyond the comprehension of the petitioners how such a misstatement of fact can be made by the State at this juncture of the case. Because the petitioners consider this aspect to be one of the main props in their claim that

due process was denied petitioners, this allegation by the State is answered herein.

Petitioners direct this Honorable Court's attention specifically to page 111, lines 9 through 13, of their Superior Court brief, where it was argued:

> "It is respectfully submitted that the deliberate suppression by the prosecution of this vital testimony • • • constituted a denial of due process."

Petitioners' entire brief before the Supreme Court of New Jersey embraced the argument that the prosecutor had knowledge of testimony favorable to the petitioners, but failed to come forward with this testimony when the Schechters perjured themselves during the course of the trial. More specifically, on page 10, lines 26 through 33, of the brief before the Supreme Court of New Jersey, the petitioners argued:

> "The testimony of the Schechters before the Grand Jury was known to the prosecutor at the time of trial, and yet the perjured testimony spoken at the trial was allowed to go uncorrected. To have corrected the testimony would have seriously damaged the State's case. This the Prosecutor did not do. The Prosecutor's failure to correct the perjured testimony denied defendants a fair trial in violation of due process."

The petitioners further cited the Canons of Professional Ethics incorporated into the New Jersey Rules:

> "The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible, Canon 5 of Professional Ethics (R. R. 1:25)."

These points were fully expounded on oral argument before both the Superior Court and Supreme Court of New Jersey, as well as having been argued before the County Court on the earlier motion for a new trial.

It seems to us that the printed record speaks most eloquently against the present contention of the State on this aspect.

Respectfully submitted,

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David Schneider.

MORRIS SPRITZER,
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